UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	Chapter 11
	.	
MOTORS LIQUIDATION COMPANY,	.	(Jointly administered)
Et al., f/k/a GENERAL	.	
MOTORS CORP., et al,	.	One Bowling Green
	.	New York, NY 10004
Debtors.	.	
	.	Wednesday, December 6, 2017
. . . . .	.	4:02 p.m.

TRANSCRIPT OF HEARING RE: TELEPHONE CONFERENCE,
ON THE RECORD, REGARDING DISCOVERY
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

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(Proceedings commence at 4:02 p.m.)

THE COURT: All right. This is Judge Glenn. We're on the record in Motors Liquidation Company, 09-50026. I have the list of appearances in front of me. Who's going to begin?

MR. GONZALES: Good afternoon, Judge Glenn. This is Rudy Gonzales. I'm the partner of Bob Hilliard representing the signatory plaintiffs. With your permission, I just would -- this is a very limited area of inquiry.

There was a meeting held on August the 15th between the GUC Trust and New General Motors. And at that meeting there were different individuals. One of the individuals who attended the meeting was a gentleman -- an attorney by the name of Keith Martorana with the law firm of Gibson Dunn, the Gibson Dunn law firm representing the GUC Trust. And he testified in his deposition that he took notes during the meeting. And we have asked for those notes, the plaintiffs have. And I believe that the trust is asserting a work product privilege to those notes.

And the issue for today, Your Honor, is simply whether or not the trust should turn over those notes taken during the meeting to the plaintiffs. And that's it in a nutshell. I'll stop for a moment in case the Court -- I mean, I have an argument to make on why the notes should be produced, but I'll stop for right now unless the Court wants me to proceed.

THE COURT: No. Let me put a few facts on the record. At my request, Gibson Dunn delivered to chambers for in-camera review six pages of handwritten notes which were represented to be Mr. Martorana's notes from the August 15th meeting. And I've -- I guess I got that -- I think it was at the end of last week. Today, deposition transcripts and exhibits and voluminous materials for the trial, both sides' exhibits, copy of the joint -- proposed joint pretrial order were delivered. And among the materials is the deposition transcript of Keith Martorana. And it relates to the deposition on November 20, 2017, of Mr. Martorana. And it has the designations and counter-designations of the parties indicated -- highlighted in color.

I have -- this afternoon, I read the portions of the transcript of Mr. Martorana that relate to the meeting with Gibson Dunn as to which this controversy relates. And I certainly see in the transcript where Mr. Martorana acknowledges that he took notes during the meeting. So for everybody's benefit, I have read -- I -- my focus in the transcript was the portion of the transcript that related to that meeting at Gibson Dunn.

And I also have reviewed the handwritten notes of Mr. Martorana. Written at the top of the first page is subject to Federal Rule of Evidence 408, but -- so I had asked for and did receive the -- those notes for in-camera review and I have

had the opportunity to do that.

Mr. Gonzales, why don't you go on and --

MR. GONZALES: Yes.

THE COURT: -- make your argument.

MR. GONZALES: Yes, Your Honor. Thank you. And so with that background, Your Honor, the reason that these notes would not fall within the protected category is -- number one, is that the GUC Trust simply would not be able to assert or establish that these notes were taken in anticipation of litigation. The rule that the -- Federal Rules of Civil Procedure 26(b)(3) specifically addresses when attorneys' notes might be protected. And they relate specifically to anticipation of litigation. And I'm sure the Court has heard various arguments in that regard, but it's a very tight and strict interpretation of what anticipation of litigation would mean. And it simply would not apply here.

This August 15th meeting was simply a meeting in the regular course of business between the GUC Trust and New General Motors presumably to discuss the settlement agreement that we believe that the GUC Trust had met -- or had entered into with the plaintiffs. And of course there's a dispute about the -- whether or not it's -- that agreement is a binding agreement. But nonetheless, that was the purpose of that meeting. It was not for the purpose or anything related to anticipating litigation between the plaintiffs and the trust,

or anyone else for that matter. New General Motors wanted to attempt to dissuade the GUC Trust from holding on to the agreement that they had entered into the -- with the plaintiffs and that was the purpose of that meeting. So we believe that the first step -- the first requirement or proof requirement, which would be by the party attempting to assert the privilege, the work product privilege, cannot be met because that meeting was not in anticipation of litigation.

If the Court were to believe or to hold that in fact the meeting was in anticipation of litigation, there is a second prong by which then we would ask the Court to perhaps consider protecting the part of the notes which may contain mental impressions, conclusions, opinions, or legal theories, separate out those parts of the notes from parts which are merely factual in nature. For example, this person said this or this person said this. In other words, where the notes simply indicate who is saying what in the meeting. Because that -- we -- it would be our -- you know, our position that those would not be protected as mental impressions but simply a statement of who was saying what in the meeting.

And frankly, Your Honor, that's where we are. We don't believe they're protected because this meeting was not in anticipation of any litigation, much less any specific litigation with the plaintiffs. And second of all, if the Court were not to agree on that position, then we would like

those portion of the notes which are not mental impressions of Mr. Martorana.

THE COURT: Let me ask you a couple of questions, Mr. Gonzales. Let's assume that I conclude that the notes were prepared in anticipation of litigation. And I appreciate what you said about suggesting redaction of mental impressions, opinions, et cetera. But 26(b)(4) has a second prong that requires, Romanette (ii):

> "That the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."

So that -- assuming that the notes were prepared in anticipation of litigation and the opinions, mental impressions get excluded, redacted out, you would have to acknowledge that you have to satisfy the second prong. You have to show the substantial need. Do you agree with that?

MR. GONZALES: Yes, Your Honor. I believe that is the correct analysis. Although there are courts that -- some courts and opinions that would even suggest that not all mental impressions are necessarily protected. It's not a carte blanche absolute. But under -- I think the Court is correct. Under these circumstances, if the Court were to hold that the notes were prepared in anticipation of litigation, then one would then turn its analysis to the substantial need aspect

of -- you know, by the plaintiffs.

And of course, in this particular case the main issue and the main dispute of this particular litigation or the main dispute that we have is any comments or suggestions or indications about the "binding agreement" or whether or not the agreement was binding and what people were saying or commenting about that. And so that, of course, is of particular importance. It's very much relevant to the issue at hand. And we would certainly believe that that would be -- it would -- if there are such notes about whether or not the agreement was binding, well those -- that would be the best indication of what GUC was thinking at the time that they were meeting with New GM.

THE COURT: Okay. Anything else you want to add, Mr. Gonzales?

MR. GONZALES: Not right now, Your Honor. Thank you.

THE COURT: All right. Who's going to argue in support of protection for the notes?

MR. KARLAN: With Your Honor's permission, I will, Your Honor. It's Mitch Karlan from Gibson Dunn & Crutcher. On the question of anticipation of litigation, Your Honor had said -- advised everyone that the first line of the notes is that the notes indicate that the parties agreed that the conversation was being held under the Federal Rules of settlement agreement -- the settlement negotiation rule. I

suggest that that's the best and only necessary evidence that we need.

And the entire meeting and certainly the notes were taken in anticipation of litigation. I think that also --

THE COURT: Well, let me express my skepticism about that, only because it's sort of common practice for people to write that. And I have to say, of course, I only have a copy of the notes, but the "subject to FRE 408," which is underlined, appears somewhat less dark than the rest of the notes. So I can't tell -- I'm not deciding this on the basis of those notes. I don't know when that was written on the notes. And I -- that -- I don't think that's going to make a difference in where I come out. So why don't you go on with your argument, Mr. Karlan.

MR. KARLAN: Okay. I don't have Mr. Martorana's deposition transcript in front of me, nor do I have Mr. William's transcript in front of me. But both of them were examined extensively on the reasons for the meeting, the way in which it was set up, what everyone's anticipation of the meeting was before it took place, and then also what occurred and was said at the meeting. And my recollection -- I'm sure Rudy will correct me if I'm misstating it -- my recollection is the testimony was to the effect that there's been litigation for many, many months involving the plaintiffs and the GUC Trust about the late claims motions and the meeting was to

discuss that litigation and the publicly-announced intention of New GM to further litigate objections if in fact the plaintiffs and the GUC Trust were to proceed with the settlement that -- the draft, which had been by then disclosed to counsel for New GM.

So I would respectfully suggest that there would be no basis here for concluding that the notes were taken other than in anticipation of litigation. I don't know -- Mr. Gonzales made the remark that this meeting was in the ordinary course. I'm not aware that there's ever been a meeting other than this between counsel for the GUC Trust and counsel for New GM on this subject. There's certainly nothing in the record to suggest there's ever been such a meeting. So I don't -- I'm not sure what ordinary course he's referring to.

Unless Your Honor has more questions about that prong, I'll proceed to the burden issue. Mr. --

THE COURT: Go ahead.

MR. KARLAN: I'm sorry. Go ahead, Judge.

THE COURT: No. Go ahead.

MR. KARLAN: Mr. Matthews and Mr. Martorana were both deposed at significant length about the content of this meeting. Your Honor may recall that the last time we were all together Your Honor directed in response to certain questions that had come up and instructions not to answer that I had given at Mr. Matthew's deposition -- sorry, Mr. William's

deposition, excuse me -- that Your Honor wanted a full record of what had happened at that meeting. And so Mr. Williams was deposed a second time. And I -- and every question to my memory was answered without any objections or instructions about everything that was said at the meeting.

Again, Rudy, please correct me if I'm misstating that.

I think under those circumstances there's no possibility of demonstrating substantial need even as to any portion of the notes that Your Honor were to conclude were not mental impressions. And I would respectfully suggest that they're all mental impressions and so therefore the burden issue is irrelevant, because if they're mental impressions they're absolutely protected.

That's all I had, unless you had questions, Judge.

THE COURT: No, I don't.

Does anybody else want to be heard?

Okay. While I haven't had any briefing with respect to the issue about the notes, I believe I'm reasonably familiar with the applicable legal principles. As I said earlier, I reviewed the six pages of handwritten notes. I also today reviewed the deposition transcript of Keith Martorana. And a significant portion of the deposition involves questions of Mr. Martorana about who said what to whom during the meeting on August 15. So I believe that I don't need any supplemental

briefing in order to resolve the issue.

So this is a discovery dispute relating to six pages of handwritten notes prepared by Keith Martorana of Gibson Dunn, one of the lawyers for the GUC Trust, during a meeting with lawyers for New GM discussing the proposed settlement agreement between the plaintiffs and the GUC Trust. Who said what to whom during the meeting is highly relevant and material to the issues that will be the subject of the trial scheduled for December 18, 19, and 20, 2017.

My review of the notes leads me to conclude that the notes include a combination of verbatim or nearly verbatim recording of what New GM's lawyers said during the meeting, as well as less so what appears to be Mr. Martorana's mental impressions and opinion work product about the legal issues arising from the subjects discussed at the meeting. Under Rule 26(b)(3), a party may not discover documents prepared in the anticipation of litigation unless:

> "The party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means."

Federal Rule of Civil Procedure 26(b)(3)(A) provides:

> "Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or

its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if" --

And I'll skip Romanette (I). Romanette (ii):

-- "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

"If the Court orders discovery of those materials, it must protect against disclosure of mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."

See Federal Rule of Civil Procedure 26(b)(3)(B).

At a minium, that would require a redaction of notes if any of them must be produced. Here, of course, the participants in the meeting can be and probably already have been -- certainly Mr. Martorana was -- deposed about who said what to whom during the meeting. Plaintiffs' counsel, who were not present at the meeting, no doubt wants to use the notes in an effort to impeach or cause witnesses at trial to elaborate on their deposition testimony.

In the context in which the meeting took place, the Court concludes that the notes were prepared in contemplation

of litigation and would not have been prepared for any other reason. New GM had publicly announced and certainly had indicated at the point when I was told that settlement discussions were going on and Arthur Steinberg told me New GM lawyers were excluded from it, he made clear that New GM would oppose any settlement reached by the plaintiffs and the GUC Trust. So that and reading the deposition transcript and reviewing the notes, the Court concludes that the meeting and the purpose of preparing the notes was in anticipation of the contemplation of litigation and would have not -- would not have been prepared for any other reason.

Therefore, the Court concludes that the notes are protected under the work product doctrine unless the protection has been waived. The issue then becomes whether some or all of the notes other than mental impressions, conclusions, et cetera, should nevertheless be required to be produced. The conversations between counsel for plaintiffs and the GUC Trust recorded in the notes are not privileged. The information is discoverable if it is relevant to any party's claim or defense as proportional to the needs of the case. No issue of proportionality is raised with respect to these six pages of notes, nor could it in my view. The notes of the meeting therefore are not protected by attorney/client privilege.

To the extent the notes contain verbatim or nearly verbatim recitation of who said what to whom during the

meeting, the notes are relevant and material and subject to discovery unless protected by work product protection. It is expected that the GUC Trust will offer evidence at trial of its version of who said what to whom during the meeting. The question arises whether such testimony waives work product protection with respect to the notes.

With respect to the waiver analysis, the decision in Granite Partners, LP v. Bear, Stearns & Co., 184 F.R.D. 49 (S.D.N.Y. 1999), appears to remain an accurate statement of the law in this circuit. The court in Granite Partners stated that:

> "The work product privilege is waived when a party to a lawsuit uses it in an unfair way that is inconsistent with the principles underlying the doctrine of privilege."

It then goes on:

> "It is well settled that waiver may be imposed when the privilege holder has attempted to use privilege as both sword and shield. A privilege may be impliedly waived where a party makes assertions in the litigation or asserts a claim that in fairness requires examination of protected communications."

Skipping forward, Judge Sweet said: "Waiver typically occurs when the party asserting the privilege places the protected documents at issue through some affirmative act

intended to assure [sic]" -- "to ensure to the [sic]" -- to enure" -- there's a typo in the opinion -- "to enure to that party's benefit or where the party makes selective use of the privileged materials."

In our case, from what I've read, the GUC Trust has not used and is not likely to use notes the notes offensively or otherwise. In Granite Partners, the court focused on whether, quote, "The party's use of the document is unfair and inconsistent with the claim of privilege."

Referring to the Granite Partners, Judge Sweet said:

"In case at bar, the unfairness rises out of the LAB's possible use of allegedly privileged interview notes to impeach witnesses by reference to testimony they gave more than four years ago."

The court in Granite Partners emphasized that:

"Finally, pursuant to Rule 26(b)(3), to the extent the documents come under the umbrella of work product, they may be subject to discovery upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Back to this case. At this stage of the litigation, the plaintiffs have not demonstrated substantial need for

production of the notes. All of the participants at the meeting have or can be deposed. If the notes are used to refresh recollection in preparing for deposition or for trial, the work product protection will thereby be waived.

I must say, after reading the deposition transcript of Mr. Martorana, frankly, I thought that his deposition testimony was frankly more fulsome than the somewhat cryptic notes he had. Consequently, I have no difficulty in concluding that the plaintiffs have not shown substantial need for production of these notes. Consequently, the work product privilege is sustained and the objection is overruled.

Anything else for today?

MR. KARLAN: Not from the GUC Trust.

THE COURT: All right. Anybody else?

MR. GONZALES: No, Your Honor. I believe that's it, Your Honor.

THE COURT: Okay. So I've gotten -- obviously not relating to this discovery dispute, I've gotten the proposed joint pretrial order, which I've reviewed. I still have a lot of exhibits to review. I was somewhat surprised and a little taken aback by all of the objections that have been asserted by each side. I would certainly -- before we have the final pretrial conference, I -- you know, I would suggest get real. This is a bench trial. It seems to me that, for example, a lot of the hearsay exhibits -- it will very much depend on the

purpose for which exhibits are being offered. So I would ask that both sides confer before the pretrial, think through whether each side wants to carry forward each of the objections that have been asserted. If necessary, I will rule on them, obviously.

But, you know, I think -- on the whole, I think you did a very good job with the pretrial order. I still have to go through some more of the exhibits to the pretrial order. And I certainly have not been through all of the exhibits. The only deposition I've looked at is the transcript of Keith Martorana. I appreciate the way it was done, color coding the designations and counter-designations.

So I will see you all at the final pretrial. We're adjourned.

MR. GONZALES: Thank you, Your Honor.

MR. KARLAN: Thank you, Judge.

THE COURT: Okay.

MR. KARLAN: Thank you.

(Proceedings concluded at 4:29 p.m.)

* * * * *

C E R T I F I C A T I O N

I, Liesl Springer, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

LIESL SPRINGER, AAERT NO. 685 DATE: December 8, 2017

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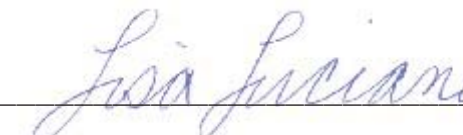

LISA LUCIANO, AAERT NO. 327 DATE: December 8, 2017

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